SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 67

HORACE A. YOUNG, BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND; CORBIN DISMUKES AND GARALDINE DISMUKES ROBERTS,

Petitioners,

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER, MID-CONTINENT PETROLEUM CORPORATION AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents

BRIEF OF PETITIONERS' IN REPLY TO RESPONDENTS' BRIEF

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INDEX

AUTHORITIES

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RESPONDENTS' CONTENTION, THAT THE U. S. COURT OF APPEALS, IN ITS ORDER REMANDING THE ACTION TO THE DISTRICT COURT WITH INSTRUCTIONS TO PERMIT APPELLANTS TO APPLY TO THAT COURT FOR LEAVE TO AMEND THEIR COMPLAINT, DID NOT HAVE THE EFFECT OF DIRECTING OR AUTHORIZING FURTHER PROCEEDINGS IN FEDERAL COURT, IS NOT WELL FOUNDED

A careful review of "Brief of Respondents in Opposition to Petitioners' Petition for Writ of Certiorari and to their

Brief in Support thereof" reveals certain discrepancies as well as some misinterpretation of the law relating to the case at bar, and, without undue discussion, we desire to point out these discrepancies.

At page 4 of Respondents' Brief, respondents state:

> "On August 8, 1945, the court denied said petition for rehearing and remanded said actions to the District Court *with instructions* to 'permit the appellants to apply to that court for leave to amend their complaint, if they so elect, for the purpose of stating jurisdiction, if possible * * *'." (Italics ours)

Counsel for respondents, after making this statement, then interprets the court's language as set out above to mean that the only significance of the Circuit Court of Appeals' action in remanding the cause was to amend their complaints. The language of the court, as quoted by counsel for respondents (see above) refutes this argument without necessity for further discussion, for the Circuit Court of Appeals *instructed the District Court to permit appellants to apply for leave to amend.* The action of the Circuit Court of Appeals was not intended as permission to the plaintiffs, but, instead, was intended as instruction to the District Court. Regardless of the final determination that the Circuit Court of Appeals exceeded its authority in so instructing the District Court, plaintiffs had a right to rely upon the order of that court remanding the case, and to determine now that insofar as the nonsuit is concerned, that plaintiffs had no right to rely on the order of the Circuit Court of Appeals would be to destroy the faith of the people in the courts.

The Arkansas nonsuit statute was enacted for the purpose of extending the time within which persons could file new suits after nonsuit without the loss of their rights because of the running of the period of statute of limita-

tions. The application of that statute to this case is certainly in line with the purpose for which this remedial statute was enacted. The Arkansas Supreme Court has consistently held that the remedy should be held to be coextensive with the evil, and under such determination, it certainly was applicable in the case at bar. This was not a mere erroneous decision. It was, in fact, one which denied to plaintiffs the benefits of the applicable statute in this case.

Regardless of how the language of the U. S. Circuit Court of Appeals may be twisted to meet respondents' needs, it is obvious that the order entered therein had the effect of authorizing and even directing further proceedings in the court. So long as there were further proceedings authorized or directed, no nonsuit could have been suffered, for the nonsuit could only have been suffered upon the termination of all proceedings in the Federal courts.

Refusal of the Supreme Court of Arkansas to Determine the Only Issue Before It

Respondents contend (page 7 of their brief) that the Supreme Court of Arkansas did not determine when the nonsuit was suffered. This was pointed out by petitioners in their original brief (pages 20 *et seq.*). The effect of the Supreme Court's refusal was to fix the time at which the nonsuit was suffered as being sometime prior to the final proceeding in the Federal courts, but the actual language of the court and its actual determination amounted to a refusal to determine the issue. Respondents contend that the Supreme Court of Arkansas had a right to refuse to determine this issue and that the Supreme Court is the only judge of when and to whom a statute shall or shall not be applied. The statute is a duly enacted statute of Arkansas. It provides that in cases of nonsuit, a period of one year after the date of nonsuit is allowed for the bringing of the

new action. There are no further conditions other than this and were it determined that the nonsuit was suffered on or after September 19, 1945 (one year prior to the bringing of the action in the Columbia Chancery Court), then the courts had no alternative other than to hold that the bringing of the action was timely.

The Columbia Chancery Court wrongly determined that the nonsuit was suffered on August 8, 1945. The lower court's opinion specifically so states. Petitioners contended that such a holding was wrong and appealed the case to the Supreme Court of Arkansas. Had the Supreme Court of Arkansas announced that it determined that the nonsuit was suffered August 8, 1945, and that it therefore affirmed the lower court's opinion, or had it affirmed the lower court's decision without a written opinion, thus, in effect, adopting the decision of the lower court as being correct in all particulars, such decision would have presented no Federal question insofar as this particular point is concerned, for although the opinion would have been erroneous, it would have been a decision by the Arkansas Supreme Court, and the fact that it was erroneous would not serve to provide review before the Supreme Court of the United States. But the Supreme Court of Arkansas, instead of so determining or so holding, held specifically that it did not determine that the nonsuit was suffered on August 8, 1945. It specifically stated that it did not determine *when* the nonsuit was suffered (page 21).

When it so held, it, in effect, stated: "We will affirm the decision of the Columbia Chancery Court, although we do not determine whether it was right or wrong", and when it took this attitude, it deprived plaintiffs of the right of appeal, for their issue was not determined on appeal, although the Supreme Court specifically stated that it was not holding that the decision of the lower court was correct.

The Constitution and Statutes of Arkansas provide for

appeal to the Supreme Court of Arkansas from decisions of the lower courts as a matter of right. In other words, due process in Arkansas includes the right of appeal to the Supreme Court, and this includes a determination of the issues. This does not necessarily mean that the Supreme Court of Arkansas must write an opinion on each matter presented to it, for in cases where it does not write an opinion, it will be assumed that the Supreme Court adopts in its entirety the decision of the lower court. In the present case, however, the Supreme Court, by its own language, did not adopt the decision of the lower court, nor did it determine the issue, and for this reason, due process was not afforded petitioners in the courts of Arkansas.

Respondents recognized the fact that the Supreme Court refused to determine the issue in the case. [See page 7 of Respondents' Brief where respondents state: "*Said court specifically declined to determine whether petitioners suffered nonsuit in their prior actions on said date.*" (Italics ours)] Respondents, however, do not attempt to argue petitioners' contention in this matter although they recognize the issue. (See last sentence on page 7 of Respondents' Brief.)

The Interest of the Minor Petitioners

Respondents urge this Court to refuse to consider the rights of the minors, Betty Jean Gilbert and Patsy Marie Gilbert, because they claim that the law in Arkansas is well settled as to the minors' substantive right to claim their disability of minority in cases such as the one at bar. The facts involving this case are, however, considerably different from any case previously decided upon by the Supreme Court of Arkansas.

However, before we discuss the minors' right to claim their disability herein, let us consider whether or not due process of law has been afforded the minors. It cannot be

denied that they are entitled to their day in court regardless of the validity of their claim of disability. This claim of disability was urged in the Chancery Court of Columbia County, Arkansas. The Federal question was not urged for the simple reason that the plaintiffs did not and, indeed, could not foresee that the Chancellor did deny their claim without even ruling on it in any way whatever. The Chancellor, in the findings of the court and in the decree, however, denied the rights of the minors without determination of the issue as to whether they were entitled to an extension of the period of limitations because of their minority. This very simple question was not even discussed by the Chancellor in the findings and in the decree. The point was then urged before the Supreme Court of Arkansas and it was insisted in plaintiffs' (appellants) brief that the rights of the minors had been overlooked by the Columbia Chancery Court and that the minors were entitled, as a part of their constitutional right, to a determination of this issue. Again, their rights were ignored and the Supreme Court, in its opinion in this case, made no mention whatever of the minors and their right to consideration of their disability because of their minority.

Respondents urge that the Supreme Court did not have to write an opinion and, therefore, it did not have to rule on this important issue. But, the issue must certainly have been determined by some court, for if the issue were not determined and at the same time the minors were barred from claiming their rights in the future because of the doctrine of *res judicata*, then the minors' property and rights were taken from them without due process of law in violation of the Federal Constitution.

This matter was pointed out to the Supreme Court of Arkansas on petition for rehearing. This was not the first time the issue had been urged, but it was urged more strongly for the reason that it has not been foreseeable

by plaintiffs (appellants) that both the Columbia Chancery Court and the Supreme Court of Arkansas would attempt to take away these minors' rights without a legal determination of their claim to the right to evoke their disability.

For the above reasons, it is respectfully submitted that regardless of whether the minor petitioners are right or wrong in their contention that they have a valid disability and that, therefore, the period of limitations has not run on their cause of action, they are entitled to due process of law before this claim is dismissed and barred by the doctrine of *res judicata,* and inasmuch as this has not been done, they are entitled now to a writ of certiorari so that their claim may be properly adjudicated.

Let us now determine the merit of their claim to the right to invoke their disability of minority in view of the Constitution and laws of Arkansas and decisions of the Arkansas Supreme Court in connection therewith. Section 8939 of Pope's Digest provides:

> "If any person entitled to bring any action, under any law of this State, be, at the time of the accrual of the cause of action, under twenty-one years of age, or insane or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within three years next after full age, or such disability may be removed."

In the present case, upon the death of Sarah E. Pace, her daughter, Mary Christine Pace, had a cause of action for recovery of her portion of this land. Mary Christine Pace was *non compos mentis* from the date of her birth to the date of her death on December 27, 1939. The period of limitations did not and, indeed, could not run during the period of her disability, which was the entire period of her life. Upon her death, a cause of action accrued to Betty Jean Gilbert and Patsy Marie Gilbert, minors, in connection

with their right to recover the land which they had inherited. In other words, the cause of action of the minor children arose upon the death of Mary Christine Pace and prior to that time they had no cause of action.

Section 8951 of Pope's Digest states:

> "No person shall avail himself of any disability in this act mentioned unless such disability existed at the time the right of action accrued."

This is the only section of Pope's Digest having to do with limitation as to claiming disability in connection with the statute of limitation. The Act digested in this section was brought forward in the revised statutes. It is a very old act and was passed by the Legislature at a time when coverture of a female constituted a disability. The purpose of it was to keep heirs of a female who married while still a minor from claiming her disability during the entire period of her lifetime by tacking the disability of minority to that of coverture.

This section does not apply in the case at bar, for the right of action of the minors, Betty Jean Gilbert and Patsy Marie Gilbert, accrued on December 27, 1939, the date of the death of Mary Christine Pace. Their disability of minority existed then and exists now and that is the disability of which they wish to avail themselves. Thus, it may be seen that Section 8951 of Pope's Digest does not bar them from asserting their disability of minority.

Respondents cite *Dowell* v. *Tucker*, 46 Ark. 438; *Millington* v. *Hill*, 47 Ark. 301; *Reed* v. *Money*, 115 Ark. 1 and *Hoggard* v. *Mitchell*, 164 Ark. 296 as authorities for their contention that the minors' right to assert their disability of minority is barred because of Section 8951 of Pope's Digest. An examination of these Arkansas cases, however, reveals that every one of them involves the disability of a married woman during coverture, which was the precise type of

case for which the act digested in Section 8951 of Pope's Digest was enacted. This is obvious from the language of the court in *Reed* v. *Money*, 115 Ark. 1, 8, where it was stated by the court:

> "Appellant contends that her marriage to Reed in 1871, before she reached her majority, prevented the bar of the statute of limitations on account of nonage attaching. But appellant can not tack her disability of coverture and nonage in order to prevent the bar of the statute, *for at the time her alleged cause of action accrued she did not labor under a double disability.* She was an infant at that time, but she was not also a married woman. No cumulative disability shall prevent the bar of the statute of limitations. Last clause of section 5656, supra." (Italics ours)

It may also be seen from the language of the court in *Millington* v. *Hill, supra,* as follows:

> "Mrs. Millington undertook to evade the force of the statute by alleging that she was under age in 1863, and afterwards married and is still covert, but she cannot tack her disabilities in this way. *She should have brought her suit within the period allowed her by the statute after coming of age, notwithstanding her coverture.*" (Italics ours)

The reasoning in these cases is obviously not applicable in the case at bar. Mary Christine Pace was *non compos mentis* and at no time during her lifetime did she have sufficient mental ability to realize that she had property or property rights. The minors, Betty Jean Gilbert and Patsy Marie Gilbert, were, at the time of accrual of their cause of action, seven years and three years of age, respectively, and at this tender age could have no knowledge of their duty to bring an action. It was recognized by the courts even during the period when coverture constituted a disability that a married woman of normal intelligence

had sense enough to know what her rights were and could, through the aid of her husband and friends, protect her rights. For that reason she did not need to be protected further than the single protection of disability because of coverture. The disability of coverture did not arise out of any actual need, present at the time of the enactment of the statute digested in Section 8951 of Pope's Digest, but, instead, was a "hangover" from the Common Law of England, and developed during the time when married women were considered little more than chattels.

The only need for such a statute present at the time of the passing of the act providing disability for wives under coverture was protection from the fraud of their husbands. The statute therefore granted a dual disability only in cases where the dual disability (i.e., minority and coverture), was present when the cause of action arose. Where the cause of action arose during minority, but not during coverture, the dual disability was not deemed necessary, for the husband would have as much reason to want to recover his wife's lands as would the wife.

The above merely proposes to explain the reason for the act digested in Section 8951 of Pope's Digest and the old act granting disability to *femmes* covert. Inasmuch as disability of coverture has been removed since the passage of the act digested in Section 8951 of Pope's Digest, the significance of this section is restricted to cases involving disability of coverture when that disability could be claimed. It is not applicable here.

Use of Rule 60B of the Federal Rules of Civil Procedure In Interpreting State Statutes

Respondents argue, first, that the Supreme Court of Arkansas did not apply Rule 60B of the Federal Rules of Civil Procedure in interpretation of the nonsuit statute, but an even casual reading of the opinion of the Arkansas

Supreme Court leaves no doubt but that that court did rely almost wholly upon this Federal rule to deny plaintiffs the right to trial on the merits of their case.

Counsel for respondents, after arguing this point, apparently reread the opinion of the Arkansas Supreme Court, for they stated:

> "And even if it had looked to said rule to ascertain whether the present action was brought within the time prescribed by the aforesaid Section 8947, Pope's Digest, it still would have been simply construing and applying said statute, and, under the decisions above cited, this Court could not review its action."

This argument is, of course, erroneous on its face, for once it be determined that the Arkansas Supreme Court applied the Federal Rules of Civil Procedure to its interpretation of a State statute, then it must be recognized that the portion of the Federal Constitution relating to delegation and reservation of powers between the State and Federal governments has been violated.

In the present case, the situation is even stronger, for Congress, in enacting the enabling act for the Federal Rules of Civil Procedure (28 U. S. C. A., Section 723b), specifically provided that the rules were to be for use in Federal courts only and were to have no application in State courts. The Federal courts have further determined that the Federal Rules of Civil Procedure shall not, in any way, affect the rights of parties in State courts. (*Reader* v. *Baltimore and Ohio Railroad Co.*, C. C. A. Ill., 1940, 108 F.(2d) 980.)

When respondents tacitly admitted that this rule was used by the Supreme Court of Arkansas to interpret a State statute, they thereby opened the door for review of that court's opinion by the Supreme Court of the United States.

Was Presentation of the Federal Questions Involved Herein Timely?

Respondents, at page 12 of their brief, apparently in sheer desperation, finally urge that petitioners are not entitled to a review of the Federal questions presented herein because the questions were not raised in time. Respondents cite several cases in support of this contention. These cases merely hold that the Federal questions must be presented as soon as they arise, and if they arose in the lower court, they must be urged in the lower court. *Radio Station WOW, Inc., et al.* v. *Johnson,* 89 L. Ed. 2092, 326 U. S. 120 (Headnote 4) is authority for petitioners' contention that when the Federal question is presented at the first opportunity after such question has arisen, it is timely. Let us now examine a few of petitioners' contentions to determine whether the presentation of the Federal questions involved in each was timely.

One of petitioners' contentions is that refusal of the Supreme Court to determine the issue before it, amounted to refusal by that court to review the case on appeal, and that this constituted a denial of petitioner's right of appeal guaranteed under the Arkansas Constitution and laws, which, in turn, constituted denial of due process. As pointed out above, had the Supreme Court affirmed, with or without written opinion, the determination by the Columbia Chancery Court that a nonsuit was suffered in Federal Court on August 8, 1945, there would have been no Federal question in connection therewith, even if the decision had been admittedly wrong, but, by refusing to determine this all-important issue, due process was denied even should it be determined that the nonsuit was actually suffered on August 8, 1945. The denial of due process is certainly in violation of the Federal Constitution and is a Federal question. It did not arise in the Columbia Chancery Court and,

therefore, it could not have been presented to that court nor could it have been presented on appeal. Petitioners' first opportunity to present the question after it arose was on petition for rehearing, and the issue was then and there presented, but without avail. Under authority of *Radio Station WOW, Inc., et al.* v. *Johnson, supra,* this Federal question was properly raised.

Another of petitioners' contentions is that the State courts denied full force and effect to the order of the Circuit Court of Appeals remanding this case to the District Court for leave to amend. This Federal question was urged in the lower court, was urged on appeal to the Supreme Court of Arkansas, and was again urged in petitioners' petition for rehearing. It has been, since the beginning of this action in the Columbia Chancery Court, one of petitioners' main contentions and how, in view of the discussion throughout the trial of this case, respondents can now state that petitioners did not raise this question until their petition for rehearing in the Supreme Court of Arkansas, is beyond us. The record will reveal that this has been one of the main issues throughout the trial of this case.

The Federal question as to violation of the Federal Constitution's provisions for separation of powers between the State and Federal governments, said violation arising out of the Supreme Court's use of Rule 60B of the Federal Rules of Civil Procedure to interpret the State statute, was raised for the first time on petition for rehearing, which was the first opportunity petitioners had to present the question after it arose in the opinion of the Supreme Court of Arkansas.

As was heretofore pointed out, the right of the minors to claim the disability of their minority has been asserted throughout the proceedings. In fact, it has been continually brought to the attention of the courts that to refuse

to make any determination of their rights constitutes taking their property without due process of law.

Thus, we see that there is no merit whatever in respondents' contention that the presentation of the Federal questions involved herein was not timely.

Conclusion

In conclusion petitioners reiterate their request for a Writ of Certiorari so that due process of law may be afforded them and they may have a hearing of their case on its merits. It should be remembered that petitioners, although they have diligently and persistently pursued what they honestly believed to be their remedy from the time when their cause of action arose until the present time, have been constantly denied the trial of their case on its merits. They cannot be said to have been guilty of laches nor of negligence in any way. Should this Court deny them a Writ of Certiorari, then their opponents will have been successful in preventing the trial of a legitimate cause of action in which the plaintiffs were without blame as to either the Arkansas statute of limitation or the doctrine of laches.

In the past half century our court system in this country has, by means of legislation and by development of the *lex fori*, turned away from the old "sporting theory" of law. Modern legislation and advanced judicial thought incline toward the abolition of a system whereby a litigant could lose his right to a trial of his case on its merits because of an error in choosing a forum or the form of his pleading. Such legislation and judicial thought is aimed at giving to every litigant a right to a trial of his case on its merits, such trial to be denied only when the litigant is lax or delinquent in pursuing his remedy. If this Court denies that these petitioners have a right to a trial on its merits, keeping in mind the fact that they have not been negligent,

and that the doctrine of laches is not available to respondents, then, indeed, it may be said that the ghost of the "sporting theory" of justice has arisen from the grave.

Respectfully submitted,

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